

DECISION



18813 R. Feldman
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-200265

DATE: July 14, 1981

MATTER OF: Pope, Evans and Robbins, Inc.

DIGEST:

1. Contracting officer reasonably determined protester's newly formed subsidiary corporation was nonresponsible because it lacked financial resources or ability to obtain such resources, where letter establishing line of credit for protester did not mention subsidiary corporation and cable stating that protester would "stand behind" subsidiary corporation was insufficient to provide assurance that protester would provide financial backing for contract term.
2. Fact that RFP did not require offeror to have existing labor force does not preclude contracting officer from considering, as part of his responsibility determination, prospective contractor's ability to obtain personnel.
3. Contracting officer did not abuse discretion when refusing to discuss negative preaward survey findings with offeror where serious deficiencies were noted in report, report was received day protester called to discuss matter, and contracting officer was faced with need to make urgent award.
4. Fact that newly created subsidiary corporations received awards for prior procurements doesn't necessarily mean protester's plan to establish subsidiary corporation for instant procurement would be acceptable, since before protester's subsidiary could receive award it must be found responsible.

Pope, Evans and Robbins, Inc. (PER), on behalf of its German subsidiary PER, GmbH, protests the award of contracts under request for proposals (RFP) DAJA37-80-R-0354, issued by the Department of the Army, for the performance of maintenance repairs and similar services on oil and coal boilers at 19 Army locations in the Federal Republic of Germany.

PER, GmbH submitted the lowest priced offer for three geographic areas. On the basis of a preaward survey, however, which indicated PER, GmbH was deficient in the area of technical capability and had

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limited financial capability, no facilities and equipment, no accounting system, no quality assurance capability, no labor resource and no past performance record, the contracting officer found the firm to be non-responsible.

PER objects to that determination, asserting that it was based on certain considerations--such as lack of an existing work force--not required by the RFP and that it did not take into account PER's ability and willingness to stand behind its subsidiary. PER also asserts that the contracting officer had a duty to discuss these matters with PER, GmbH before he made a final determination, and that the contracting officer's actions were inconsistent with how other firms had been treated and inconsistent with the alleged acquiescence of the contracting officer in PER's plans for establishing a subsidiary to compete on the procurement.

PER states that many of PER, GmbH's deficiencies were simply due to the recent creation of the firm in July 1980 and that at the time of the preaward survey in August or September it had not yet hired any workers or established an accounting system and had extremely limited financial resources. PER, GmbH states, however, that it advised the preaward survey technician that it would use the same accounting system as PER, and as evidence of its financial capability it furnished a letter from a New York bank extending a \$2,000,000 line of credit to PER.

Responsibility determinations are matters for contracting officers, who are vested with a considerable degree of discretion in determining a prospective contractor's ability to perform a contract. Accordingly, we will not overturn a nonresponsibility determination unless it was made in bad faith or lacked a reasonable basis. RIOCAR, B-180361, May 23, 1974, 74-1 CPD 282. Here, we cannot say that the contracting officer lacked a reasonable basis for his decision.

Defense Acquisition Regulation (DAR) § 1-903.1 provides minimum responsibility standards--such as adequate financial resources or the ability to obtain such resources--which a prospective contractor must meet. *DAR § 1-903.4 further provides that where a prospective contractor doesn't have existing financial resources or personnel on hand, evidence of its ability to obtain personnel and financing shall "normally" be some type of commitment or explicit arrangement for the acquisition of such resources or personnel. In other cases, there must be some basis from which the contracting officer reasonably can determine that it can obtain such resources and personnel without a firm commitment.

Fischer Engineering & Maintenance Company, Inc., et al., B-179193, April 1, 1974, 74-1 CPD 158. Thus, while the RFP did not explicitly require an offeror to have an existing labor force or financial resources, the contracting officer, as part of his responsibility determination, properly could consider whether PER, GmbH realistically could hire the incumbents' labor force and obtain financing, and it was incumbent on the company to affirmatively demonstrate that it could. DAR § 1-902.

The preaward survey clearly indicated that PER, GmbH did not have its own financial resources. The line of credit established for PER was not automatically available to PER, GmbH--the letter from the bank which PER, GmbH furnished did not mention PER, GmbH. While a contracting officer should consider evidence that an affiliated concern will guarantee a bidder's/offeror's financial or performance capability before making a responsibility determination, B-158420, August 1, 1969, here there was nothing resembling such a guarantee or any other commitment, but only a cable stating that PER would "stand behind" PER, GmbH. In this connection, the records shows that the contracting officer originally advised PER that its cable was sufficient, but that he later determined that it was not adequate to bind PER financially to PER, GmbH under German law. In this respect, PER asserts that the contracting officer should have then contacted PER. However, a contracting officer has no duty to independently gather additional information to resolve his/her doubts created by data already submitted. B-170909, March 17, 1971. While the contracting officer could have contacted the firm to advise that he no longer believed the cable would suffice, there is no legal requirement that he have done so. The bidder has the duty to clearly establish that it can perform a contract, and it necessarily runs some risk when it seeks to rely on another firm's financial capacity when there is no legal obligation on the part of that other firm to make that capacity available to the bidder. This risk was not obviated merely because of the contracting officer's informal advice concerning the acceptability of the cable, since ultimately the contracting officer had to be able to make an affirmative finding of responsibility, and the non-binding nature of the cable clearly gave rise to some question concerning PER, GmbH's financial capability. In short, we think it was within the contracting officer's discretion to ultimately view the cable as insufficient to provide reasonable assurance that PER would provide the financial and other support that PER, GmbH would require to perform the contract and to make his determination without further contact with PER.

The preaward survey also indicated PER, GmbH's lack of labor resources. While the contracting officer acknowledges that it is

standard practice to hire incumbent contractor personnel, we believe he again had the discretion to view PER, GmbH as having failed to demonstrate its responsibility in this respect in light of the pre-award survey report that PER, GmbH had not acquired some of the specialized personnel required to work on the boilers nor had "an explicit arrangement to get them."

With respect to PER's contention that the contracting officer had a duty to discuss the negative preaward survey findings with the firm, we point out that it is within the contracting officer's discretion not to discuss negative preaward survey findings with a prospective contractor before making a responsibility determination. DAR § 1-907; RIOCAR, supra. Here, the record shows he had received the negative preaward survey report the same day PER, GmbH's representative called to discuss certain matters and, at this time, the boiler services were urgently needed because of the onset of the winter heating season in Germany. In light of Per, GmbH's lack of financial resources, the numerous deficiencies cited in the preaward survey report and this time constraint, the contracting officer reports that he felt no useful purpose would be served by discussing the deficiencies with PER, GmbH. This again is a discretionary matter and we find no abuse of discretion here.

We also find no basis to sustain the protest in light of the allegations of inconsistent contracting officer action. While the protester contends that two firms previously awarded boiler contracts had also registered newly formed subsidiaries without an established labor force, and also relied on the incumbent contractor's work force, this does not establish that the contracting officer's actions were improper here. Each case must be determined on its own merits. What is controlling is that the contracting officer could not in this case make the requisite finding that PER, GmbH is responsible. There is no evidence that the contracting officer's decision is the result of fraud or bad faith; and as set forth above, we believe the record shows the contracting officer did not abuse his discretion in finding Per, GmbH to be nonresponsible.

Finally, in response to the assertions that he acquiesced in PER's plans to set up the subsidiary to compete for this procurement, the contracting officer states that he only "encouraged" the PER, GmbH's representative to compete for this procurement, and we find no evidence in the record that the contracting officer specifically approved or otherwise agreed to the specifics of PER's plan to establish a subsidiary corporation, i.e., PER, GmbH's management plan, its intent to hire the incumbent contractor's work force, etc.

The protest is denied.


Acting Comptroller General
of the United States